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September 8, 1993

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William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

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SEP - 8 1993

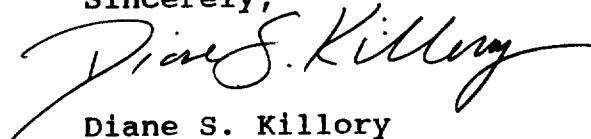
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 92-261

Dear Mr. Caton:

On behalf of the Satellite Broadcasting and Communications Association of America, enclosed please find an original and five copies of our Petition for Clarification or Reconsideration of the Commission's July 23, 1993 Report and Order in the above-referenced docket. Also enclosed is an extra copy to be file stamped.

Sincerely,


Diane S. Killory

DSK:mw
Q08895

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 22 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

Equal Employment Opportunities)
_____)

MM Docket No. 92-261

To: The Commission

**PETITION FOR CLARIFICATION OR RECONSIDERATION OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION OF AMERICA**

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429(a), the Satellite
Broadcasting and Communications Association of America ("SBCA") hereby petitions the
Commission to clarify or modify its Report and Order ("Order")¹ in the above-captioned
proceeding to specify that its EEO requirements do not apply to the thousands of retail
satellite equipment dealers who simply sell the program packages of others and do not
control program selection.

INTRODUCTION

SBCA is a national trade association representing all segments of the direct-to-
the-home satellite television industry. Its members include:

¹ In the Matter of Implementation of Section 22 of the Cable Television Consumer Protection
and Competition Act of 1992, Equal Employment Opportunities, Report and Order, 58 Fed. Reg.
452247 (July 23, 1993) ("Order").

- satellite programmers,
- satellite system operators,
- direct broadcast satellite ("DBS") providers,
- manufacturers of satellite reception equipment,
- local, regional and national distributors,
- program packagers, and
- retail satellite equipment dealers.

The Commission in its Order expands its equal employment opportunities ("EEO") requirements to apply to all multichannel video programming distributors. SBCA agrees that the letter and spirit of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") dictate that many of SBCA's members -- such as satellite programmers, DBS programmers and program packagers -- are encompassed by the reporting and compliance requirements of the Commission's EEO rules. SBCA further agrees with the Commission's objective -- to ensure that minorities and women are represented in positions in which they have the ability to exercise selection control over the video programming provided to the consumer.²

SBCA respectfully submits, however, that to the extent the Order imposes EEO requirements on all satellite dealers, it is unnecessarily broad. As explained more fully below, the vast majority of dealers simply sell the programming packages of others with no control over the program selection in the packages and should, therefore, not be subject to

² Order at ¶ 45.

the EEO rules. SBCA thus asks the Commission to clarify or modify its Order so that it is clear that its EEO rules do not apply to those dealers who simply sell other entities' program packages.

FACTUAL BACKGROUND

An understanding of the method by which home satellite owners (or "dish owners") acquire programming is essential to an accurate assessment of the amount of Commission oversight required to ensure a diversity of program sources. Unlike a cable subscriber, a dish owner can receive programming from a number of sources. First, there are many channels available "in the clear" that are automatically receivable by any dish owner in the United States. These channels range from general entertainment or informational channels such as Court TV to minority and ethnic services such as Black Entertainment Television ("BET")³ and Telemundo. Second, consumers may purchase scrambled or encrypted programming.

Dish owners can purchase encrypted satellite program services either on a per channel basis or in packages, from several distinct sources: (1) programmers who own individual services, (2) programmers who operate packaging services, (3) independent third-party packagers, and (4) retail satellite equipment dealers.⁴

3 Although BET may begin scrambling in 1994, it has already negotiated distribution agreements with several packagers. There is thus every indication that BET will be widely distributed.

4 According to a recent survey, 33.5% of home satellite owners who receive encrypted programming purchase programming from a programmer, 50.5% purchase programming from a third-party packager, and 27.2% purchase programming from a satellite dealer. A small percentage of dish owners also purchase programming from cable operators. Additionally, dish owners may purchase programming from a combination of all these sources. Survey conducted by Mediamark Research Inc., June 1993.

Of these sources, only the packaging services control the selection of programming. These services own or contract for the rights to distribute scrambled signals and sell them to the consumer directly or through a satellite dealer. Packagers offer consumers "one-stop" shopping by allowing the consumer to purchase as many program services as they desire without the need to order each service individually. To this end, packagers themselves assemble packages of channels. In addition, they generally allow the consumer to choose the program services they desire entirely on an a la carte basis⁵ or to supplement the packages they select with a la carte selections. The net effect is that each program packager offers every available program service.

A dealer, on the other hand, does not control the make-up of program packages. Typically, a dealer simply resells pre-existing packages of channels assembled by program packagers -- acting, in effect, as an agent for the program packagers. A dealer generally sells the packages of a number of program packagers and will offer consumers the entire range of choices provided by one or all of these packagers. A customer who wishes to supplement a package, however, can order through the dealer individual channels, on an a la carte basis, from the list of channels provided by the packager.

Although, a small number of dealers, in limited instances, may offer a customized package in addition to the standard packages assembled by the packager, this practice is by no means prevalent. Indeed, a dealer's ability to customize depends on the willingness of packagers, who generally discourage the practice. Moreover, a dealer has

⁵ For an example of the packages and a la carte channels typically offered by program packagers, see Attach. A.

no incentive to customize packages, given the vast number of choices already available through program packagers. Simply stated, the consumer already has the ability to receive every available program service through the pre-existing packages, and if a particular package does not contain a particular program service that the consumer wants, he or she can receive it by ordering it a la carte.⁶

**THE EXTENSION OF EEO REQUIREMENTS BY THE
COMMISSION TO SATELLITE DEALERS,
REGARDLESS OF WHETHER THEY HAVE ANY
CONTROL OVER THE SELECTION OF
PROGRAMMING, IS UNNECESSARILY BROAD**

**A. As The Commission Has Recognized, Congress
Specifically Intended The EEO Requirements To
Apply Only To Entities That Control The Selection
Of Channels Or Program Services Available To
Consumers**

Congress enacted the EEO requirements of the Cable Act to increase the representation of minorities and women in decision-making and managerial positions within the video industry as a means to ensure that "program service will be responsive to a public consisting of a diverse array of population groups."⁷ As the Commission correctly recognized, Congress imposed EEO requirements on cable operators after apparently determining that "these entities, which exercise selection control over video programming

⁶ Additionally, it is worth noting that unlike cable subscribers, satellite owners are inundated with information regarding all available program services. An overwhelming majority of the 1.3 million home satellite owners who subscribe to encrypted programming also subscribe to one of three major programming guides. These guides, produced by independent sources, provide schedules and information for all the channels available for satellite reception and contain advertisements from program packagers, listing all the packages and services available.

⁷ House Committee on Energy and Commerce H.R. Rep. 102-628, 102d Cong., 2d Sess. (1992) at 111.

provided directly to the consumer, have the greatest and most direct effect on the programming choices offered to the American public."⁸ The Commission further noted that by expanding the EEO requirements to any multichannel video programming distributor, Congress intended to impose these provisions on new technologies "that also exercise control over the programming which these technologies offer directly to the public."⁹

The Commission properly recognized, however, that its EEO requirements should not be extended to entities that do not exercise control over programming selection. Thus, for example, the Commission concluded that telephone companies that provide video dialtone service should not be subject to the EEO requirements because they do not "have the ability to exercise control over the selection of video programming" ¹⁰ Nevertheless, in its Order the Commission has defined "control" in a manner that might be interpreted to extend EEO restrictions to all retail satellite dealers, despite the fact that most of them have no control over -- and cannot limit -- the programming available to dish owners.

⁸ Order at ¶ 45.

⁹ *Id.*

¹⁰ *Id.* at ¶ 46.

B. The Commission's Order Should Be Clarified Or Modified To Exclude From Its EEO Requirements Retail Satellite Dealers That Simply Resell the Program Packages Of Others And Do Not Control Program Selection

In its Order, the Commission states that "[a]n entity is deemed to have control over the video programming it distributes if it selects video programming channels or programs and determines how they are presented for sale to consumers."¹¹ The Commission should clarify that satellite dealers -- who simply sell customers an array of packages whose content and prices are set by other entities -- do not have control over program selection and should not be subject to the EEO requirements. To the extent the Order's definition of control was intended to include all satellite dealers, the Commission should modify its definition on reconsideration so that it does not extend to retail satellite dealers who, as a practical matter, do not determine which programming is available to dish owners.

Although a dealer chooses which program packagers' services to offer, the dealer almost always affiliates with a number of program packagers. Among the various packages and a la carte services offered by the packagers, a consumer generally has access to all program services. Thus, not only does the dealer have no control over the selection of programming, the dealer in no way limits (or has the ability to limit) a consumer's choice of program services. In short, a dish owner who orders programming through a dealer has available for purchase every program service that is offered on a scrambled basis.

¹¹ *Id.* at ¶ 45.

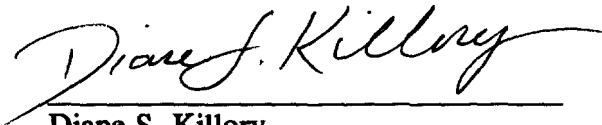
It simply is not the case, therefore, that satellite dealers typically possess the ability to "control" programming in a manner that warrants their being subject to the Commission's EEO requirements. The Commission should clarify or modify its definition of "control over programming" so that its definition is clearly tailored to the concern that the Cable Act's EEO requirements were designed to address -- *i.e.*, the ability of an entity to determine (and thereby limit) the programming available to viewers. Such a modification would not only further Congress' intent, it would avoid the unnecessary administrative burden that the Commission would face if approximately 2,000 retail satellite dealers were required to comply with EEO reporting requirements.¹²

¹² This figure constitutes the approximate number of retail satellite dealers in the United States that employ six or more persons and would, therefore, absent the clarification or modification requested herein, be subject to the Commission's EEO requirements.

CONCLUSION

For the foregoing reasons, the Commission should clarify or modify its Order so that it is clear that satellite dealers who do not control -- and cannot limit -- the programming available to dish owners, because they simply sell the program packages of other entities, are not subject to the EEO requirements applicable to those entities that have such control.

Respectfully submitted,



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September 8, 1993